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In The Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DAVID THOMPSON, ALLEN AULT, A.G. THOMAS, MICHAEL GROVES, and HUGH LONG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does incarcerating Petitioner in solitary confinement for seventeen years for his protection against imminent death from other inmates in the general prison population constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments when he could have been transferred to another prison where he would have been safe in the general prison population?

2. Does qualified immunity protect prison officials against liability for continuing the incarceration of Petitioner in solitary confinement for seventeen years to protect him against death from other inmates in the general prison population when they have been deliberately indifferent to transferring him to another prison where he would have been safe in the general prison population?

3. Does incarcerating the Petitioner where he is subject to imminent threat death in the general prison population or perpetual solitary confinement which after long periods are calculated to disrupt profoundly his senses and personality violate the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*?

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The opinion of the United States Court of Appeals for the Eleventh Circuit,, March 9, 2004, in *Doe v. Thompson, et al.*, No. 03-11576, is set forth in the Appendix at A-1, holding that the Petitioner could not maintain a cause of action under the Eighth and Fourteenth Amendments because of his seventeen years in administrative solitary confinement. The order, March 13, 2003, of the United States District Court for the Southern District of Georgia, Civil Action No. CV 695-147, is set forth in the Appendix at A-3, not allowing Plaintiff to raise at trial the length of confinement in administrative segregation. The decision of the United States Court of Appeals for the Eleventh Circuit, June 7, 2000, is set forth in the Appendix at A-5, holding that Petitioner could establish Eighth Amendment violations if he proved that he was an informant housed in segregated confinement with violent and threatening felons, that the officials ignored his requests and placed him in solitary confinement for a substantial period of time satisfying the substantial risk of irreparable harm requirement for a preliminary injunction. The order, March 28, 2000, of the United State District Court for the Southern District of Georgia, is set forth in the Appendix at A-13, granting summary judgment and not considering the length of confinement. The Magistrate Judge's Report and Recommendation, March 6, 2000, is set forth in the Appendix at A-15.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on May 20, 2003. (Appendix, A-1). The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VIII. ..nor cruel and unusual punishments inflicted.

AMENDMENT XIV. SECTION I. ...nor shall any State deprive any person, of life, liberty, or property, without due process of law;

18 U.S C. § 2340. Definitions

As used in this chapter -

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from... (C) the threat of imminent death; or (D)... other procedures calculated to disrupt profoundly the senses or personality;"

STATEMENT OF THE CASE

Petitioner, John Doe, was in the federal witness protection program because he had testified in eight murder trials involving the Nuestro Familia, Mexican Mafia, and Aryan Brotherhood resulting in contracts on his life. He was charged in Georgia for aggravated child molestation arising out of a domestic dispute. The Assistant District Attorney for Gwinnett County, Georgia broke his cover and disclosed his real name to the press during his trial. While incarcerated the Georgia Department of Corrections continued to disclosure of his real name on their website Inmate Query. He was exposed to death threats and attack by former members of the Nuestro Familia while in Valdosta State Prison and was transferred to Autry State Prison and then to Georgia State Prison where he was continually in indefinite administration segregation in solitary confinement for seventeen years. He requested to be transferred to other prisons in state and out of state and even to a federal facility where his real name would not be disclosed and where his life would not be in danger among the general prison population.

On August 17, 1995 Doe filed a complaint under 42 U.S.C. §1983 seeking relief from his incredibly long solitary confinement which was extremely punitive, from retaliatory actions of prison wardens and officials, and from the harsh conditions of confinement. The District Court, Judge William T. Moore, following the Magistrate's Report and Recommendations dismissed the Complaint for deliberate indifference in keeping him indefinitely in solitary confinement rather than transferring him to a prison where he would be safe in violation of the Eight Amendment and dismissed his Motion for Preliminary Injunction. (Appendix, A-13, A-15)

Doe filed an appeal to the United States Court of Appeals for the Eleventh Circuit to review the denial of the Motion for Preliminary Injunction. On June 7, 2000 the

Court of Appeals reversed and remanded the denial of a preliminary injunction and instructed on the dismissal of Doe's Eighth Amendment and First Amendment claims. (Appendix, A-5). The Court of Appeals instructed that Doe could establish Eighth Amendment violations if he proved that he was an informant housed in segregated confinement with violent and threatening felons and that the officials ignored his requests placing him in solitary confinement for a substantial period of time would satisfy the substantial risk of irreparable harm requirement for a preliminary injunction. The Court of Appeals also held that Doe's first Amendment claim was sufficient to support a preliminary injunction. And finding that the Petitioner met the four criteria for a preliminary injunction the Court of Appeals vacated and remanded to the District Court for an evidentiary hearing.

Armed with the Court of Appeals decision, Doe again made a Motion for a Preliminary Injunction and again the Magistrate Judge recommended denial and the District Court denied the preliminary injunction on the grounds that there had been no showing of irreparable harm because of the prison conditions, but the District Court refused to consider the fundamental Eighth Amendment issue of the length of solitary confinement. The Court of Appeals affirmed the District Court denial of a preliminary injunction on October 21, 2002. The District Court also denied a motion to have an expert appointed as well as a physical and mental examination to establish the evidence of the irreparable harm of the extreme long-term solitary confinement. His extraordinary length of solitary confinement may be the longest in modern prison history and to which the Respondents were intransigently deliberately indifferent.

In an order of March 4, 2003, the District Court reaffirmed that the length of his solitary confinement would not be addressed as an issue at his upcoming jury trial. A Motion to Modify the Court's Order was made on March 7, 2003 to consider the length of his solitary confinement as an

Eighth Amendment violation which was also was denied on March 14, 2003. (Appendix, A-3).

An appeal was taken to the United States Court of Appeals for the Eleventh Circuit appealing from the final disposition of the case on March 19, 2003 and filed as the Order of the Court on March 20, 2003 and the Plaintiff appealed the dismissal of his Eighth Amendment and Fourteenth Amendment causes of action for relief from the exceptional long incarceration in administrative solitary confinement.

At the oral argument the panel of the United States Court of Appeals for the Eleventh Circuit ordered mediation which after seventeen years finally resulted in the Georgia Department of Corrections agreeing to Petitioner's transfer from solitary confinement at the Georgia State Prison to another person where he could be safe in the general population. However, the issues remained open as to: (1) whether the District Court should have allowed the Petitioner to pursue an action under the Eighth and Fourteenth Amendments because of the deliberate indifference to his seventeen years in administrative solitary confinement, and (2) whether the Court erred in granting judgment as a matter of law in favor of the Respondents? The United States Court of Appeals for the Eleventh Circuit opinion, March 9, 2004, ruled that because the Petitioner had been in protective custody at his own request and had suffered no legally cognizable injury as a result, the District Court was affirmed on both issues. (Appendix, A-1).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER EXTENDED ADMINSTRATIVE SOLITARY CONFINEMENT VIOLATES THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT

This case presents the fundamental issue as to whether de facto keeping an inmate incarcerated in solitary confinement for an extended indefinite period of time is cruel and unusual punishment and therefore violative of the Eighth Amendment as well as the Fourteenth Amendment. The Eleventh Circuit in this case has said that even seventeen years in administrative solitary confinement does not violate the Eighth Amendment citing that the Petitioner had "suffered no legally cognizable injury as a result." (Appendix, A-2). Other Circuits have reached different results and even the Eleventh Circuit has formerly reached a different conclusion. The length of solitary confinement is a controlling factor looked to in evaluating Eighth Amendment protections of inmates against cruel and unusual punishment. *Colon v. Howard,* 215 F. 2d 227 (2nd Cir. 2000) found that 305 days of non- punitive segregated confinement was "atypical" and a "severe hardship" and set a bright line for any administrative segregated solitary confinement greater than 180 days. The Second Circuit again ruled in *Tellier v. Fields*, 280 F. 3d 69, 80 (2d Cir. 2000) that 504 days in solitary confinement was passed the limit. Even the Eleventh Circuit previously in *Sheley v. Drugger*, 833 F. 2d 1420, 1429 (11th Cir. 1987) had ruled that the length of time in solitary confinement can rise to an Eighth Amendment violation, holding that, "Sheley's twelve year confinement in CM raises serious constitutional questions." *Williams v. Fountain*, 77 F. 3d 372 (11th Cir. 1996) had previously set a high water mark in the Eleventh Circuit of twelve months in solitary confinement.

II. THE DECISION OF THE COURT OF APPEALS IN SANCTIONING THE PETITIONER'S INDEFINITE SOLITARY CONFINEMENT FOR SEVENTEEN YEARS AS PROTECTION FROM IMMINENT THREAT OF DEATH FROM OTHER INMATES CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT DEFINING CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS

The Respondents have simply put Doe to an intolerable Hobson's choice, "your life or perpetual solitary confinement." The Respondents have admitted in their briefing to the Court of Appeals that they could have transferred Doe to another jurisdiction where he would be relatively safe incarcerated in the general prison population, but the Respondents chose not to do so because the State of Georgia would have to pay for his incarceration in another jurisdiction. They also chose not to transfer him to another prison in Georgia where he could be relatively safe in the general prison population, but with deliberate indifference and even intention defiance they chose not to transfer him and to keep him in perpetual solitary confinement.

The District Court did not consider his Eight Amendment cause of action arising out of his seventeen years of administrative solitary confinement. Petitioner who is indigent had made motions to have an expert appointed and medical and psychological examination of him in order to show the extreme psychological risks and effects that long duration solitary confinement has on inmates generally and specifically on the Petitioner in his intolerable situation. The Court denied the Plaintiff's motions and then ruled that the Plaintiff had not shown irreparable injury even in the face of the then fifteen years of solitary confinement.

The Court of Appeals in the June 7, 2000 opinion found on the unusual facts in the instant case that *Farmer v. Brennan*, 511 U.S. 825, 825 (1994) was controlling

precedent that "a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment if the official knows that the inmate faces a substantial risk of harm and disregards that risk by failing to take reasonable efforts to abate it." (Appendix A-10) And the Court's decision held that under the facts of Doe's pleadings and affidavits that "Doe established an Eighth Amendment violation under *Farmer*." *Id.*at A-10. This Court also held that Doe had a viable first Amendment claim because of his filing grievances and lawsuits against prison officials and because he had filed "too many writs", that he suffered many retaliatory abuses including placing him in administrative segregation. The Court of Appeals further found that the "unusual facts establishing that Doe was a government informant and had received threats to his life, he had satisfied the second prong of the test for a preliminary injunction that there was a substantial risk of irreparable harm." *Id.* at A-11. The Court of Appeals found violative of the Eighth Amendment was that Doe as an exposed federal protected informant "had informed prison officials on numerous times of threats on his life and of his need for protective custody, that they ignored his requests, and placed him into solitary confinement as punishment." *Id.* at A-10.

Nevertheless, following remand, the Magistrate on March 6, 2000 recommended that Petitioner's Motion for Preliminary Injunction be denied considering only his solitary confinement conditions and not the length of his confinement, which on March 28, 2000 the District Court adopted which was affirmed on appeal. (Appendix, A-13, A-15). The Court in advance of trial on March 4, 2002 again ordered that the Petitioner's conditions of confinement would not be able to addressed at trial. Petitioner then requested a modification of the Court's Order of March 4, 2003 to hear the Petitioner's continued Eighth Amendment cause of action as to the length of his solitary confinement. The Court denied his motion to hear the Eighth Amendment claim arising out of the length of confinement, thereby

foreclosing him from any meaningful relief from perhaps the longest solitary confinement in recent prison history. Petitioner proceeding pro se filed a Motion for Modification to be allowed to proceed with his claim for relief from indefinite solitary confinement correctly cited the controlling precedent Supreme Court case of *Sandin v. Conner*, 515 U.S. 472 (1995) and the Eleventh Circuit case of *Sheley v. Dugger*, 833 F. 2d 1420 (1987).

In *Sandin v. Conner*, supra, the Supreme Court announced that Due Process of the United States Constitution protects against "imposing atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. 472, 474. In *Sheley v. Dugger*, supra, the Eleventh Circuit reaffirmed that twelve years of administrative solitary confinement would violate the Eight Amendment recognizing the physical and mental deterioration of inmates facing prolonged confinement in maximum security and that the existence of feasible alternatives should have been implemented including transferring the inmate to a less dangerous prison where his identity could have been kept secret or releasing him on parole. The Eleventh Circuit in *Sheley* found support in the repeated decisions Supreme Court including *Hewitt v. Helms*, 459 U.S. 460, 477 (1983) "Of course, administrative segregation may not be used as a pretest for indefinite confinement of an inmate" and *Hutto v. Finney*, 437 U.S. 678, 686 (1978) "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Sheley* also cited the First Circuit's analysis in *Jackson v. Meachum*, 699 F. 2d 578, 584-85 (1st Cir. 1983) that "the threat of substantial serious and possibly irreversible, if not critical, psychological illness together with prolonged or indefinite segregated confinement would increase the burdens on prison authorities to explore feasible alternative custodial arrangements." The opinion then latched on to the constitutionally troubling twelve years in

administrative confinement which "raises serious constitutional questions." 833 F. 2d 1420, 1429.

The graveman of Doe's complaint is the length of his indefinite solitary confinement. The District Court ruled adversely to the Plaintiff that the conditions of confinement (food, sanitary, etc) were adequate but did not rule on the length of solitary confinement as an Eight Amendment violation. Certainly the conditions of solitary confinement which the Plaintiff has had to undergo have been horrendous: solitary confinement twenty-three hours a day in 1930's cramped cells, only allowed solitary exercise one hour a day in a six foot by eight foot exercise pen (Tr. 85), constant second hand smoke (Tr. 68), constant noise (Tr. 68), always cold food (Tr. 81-81), only three showers a week (Tr.80), and no law library (Tr. 68, 80), educational (Tr. 83), or religious privileges (Tr. 83.). But these horrendous conditions of solitary confinement are not the real issue in this case. The overriding issue is that indefinite solitary confinement crosses the line and violates the Eighth Amendment because of its substantial length in light of the well known and judicially documented substantial risk of severe mental and emotional harm. Under the *Sandin* test of "atypical and significant hardship", it also violates Due Process under the Fourteenth Amendment.

The Court of Appeals and District Court case law is replete with examples of inmates who have been held in solitary segregation for extended periods and found to be violative of the Eighth Amendment. Eighth Amendment claims of prisoners confined to segregation have recognized that the length of time in isolation is a controlling factor to be considered. *Bono v. Saxbe*, 620 F. 2d 609, 614 (7th Cir. 1980); *Swell v. South Carolina, Department of Corrections*, 529 F. 2d 854, 861 (4th Cir. 1975); *O'Brien v. Monarty*, 489 F. 2d 941, 944 (1st Cir. 1974). The case of *McClary v. Kelley*, 4 F. Supp. 2d. 195 (W.D.N.Y. 1998), affirmed 237 F. 3d 185 (2nd Cir. 2001) is particularly instructive with reviews

the psychological evidence as well as summarizing the state of the law of the constitutional limits of administrative solitary confinement. *McCary* is similar to the instant case in that the inmate was kept in administrative segregation in a special housing unit in solitary confinement in his cell for 23 hours a day and solitary access to a very confined exercise call which shocked the conscience of the court that the solitary confinement continued for four years. The trial court in *McCary* cited psychological expert testimony that such solitary confinement endured in excess of four years "was beyond anything a human being can tolerate...A restriction of environmental and social stimulating that is so prolonged is a toxin that you keep feeding into that individual and he's going to get sick" and that the inmate "would suffer severe psychiatric harm" because of the "severe departure form general prison conditions." *McClary* at 207. The Court in *McCary* found that "for the purposes of *Sandin*, this Court need not and will not decide whether a specific independent psychiatric 'syndrome' exists with respect to the psychopathological effects of prolonged SHU confinement" only that "prolonged isolation from social and environmental stimulation increases the risk of developing mental illness." *McClary*, at 208. In comparison the Plaintiff's solitary confinement in this instant case continued for seventeen years for twenty-four hours a day in a five by eight foot cell and one hour a day in a six by eight foot exercise pen.

Even the head of mental health for the Georgia Department of Corrections, Dr. Jim DeGroot, was quoted recommending inmates not be held in isolation for more than 60 days cautioning, "Long-term solitary confinement can cause some inmates to become severely depressed, become suicidal or develop other serious mental illnesses." Quoted in article by Joshua B. Good, *Atlanta Journal and Constitution*, June 21, 2000, p. B8 (Attached as "Exhibit C" to Motion for Injunctive Relief). The Affidavit of Dr. Gary Ganahl, who has been a consulting psychologist for the Georgia Department for Corrections for over thirteen years

demonstrates that the "risks of medical, psychiatric, and social damages produced by forms of solitary confinement are known to be serious" and "may not be reversible once they occur." (Attached as "Exhibit B" to Motion for Injunctive Relief). Dr. Ganahl noted that:

> "The risks of medical, psychiatric, and social damages produced by forms of solitary confinement are known to be serious and relevant to both psychiatric and non-psychiatric, healthy and ill patients. These risks have been documented to increase with the length of such confinement and have been shown by research to produce serious psychiatric and medical disorders. Such disorders may not remit simply by the termination of isolation, and have not been shown definitively to be reversible once they have been caused by these special forms of incarceration.... I know of no cases in the Georgia Department of Corrections where prisoners have been allowed to stay in protected isolated custody for anything approaching this length of time. Nor would it be in their best interests of the prisoner to be permitted to stay in protected custody for so long a period, even if the prisoner requested it."

Many courts have found similar debilitating effects of prolonged solitary confinement. "Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances." *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995). There is "plenty of medical and psychological literature concerning the ill effects" of segregation of prison inmates. *Davenport v. DeRoberts*, 844 F. 2d 1310,1316 (7th Cir. 1988). "In addition to causing physical deterioration, the conditions of solitary confinement occasioned severely negative and pernicious psychological effect on some inmates." *Ruiz v. Estelle*, 503

F. Supp. 1265, 1360 (S.D. Tex. 1980). Relying on the testimony of a psychologist who found that administrative segregation "and the sensory deprivation resulting from such confinement can have extremely harmful psychological effect upon the person involved." *Kelly v. Brewer*, 378 F. Supp 447, 451 (S.D. Iowa 1974). Relying on the testimony of a psychiatrist the Court found that "solitary confinement beyond a two or three week period would have a definite adverse effect upon most people." *Landman v. Royster*, 354 F. Supp. 1302, 1307 (E.D. Va. 1973). The fact is judicially noticed that prolonged confinement in administrative segregation "may constitute cruel and unusual punishment in violation of the Eighth Amendment." *Meriwether v. Faulkner*, 821 F. 2d 408, 415 (7th Cir. 1986); *Walker v. Shansky*, 28 F. 3d 666 (7th Cir. 1994).

The remedy that the Petitioner continually asked for, to be transferred to another Georgia prison or to a federal prison under the federal witness protection program where he could mingle with the general population, has been granted in previous cases. *Streeter and Linsey v. Hopper*, 618 F. 2d 1178 (5th Cir. 1980) affirmed the District Court's ordering the transfer of prison inmates' whose lives were in danger and who were exposed to conditions considerably more dangerous than those normal in prison life.

The deliberate indifference is clearly demonstrated by reference to the Georgia Department of Corrections own Rules which in Rule 125-2-4.18 Transfers. Paragraph (3) "The Commissioner may transfer any inmate to the Attorney General or the United States, or to any State which is a member of the corrections Compact, it it is determined that the available custody, care, treatment, training, or rehabilitation of such inmate is not adequate or in the best interest of the inmate or his (her) fellow inmates." O.C.G.A. § 42-5-51(d) provides similar authorization to transfer inmates or if necessary into federal custody. This is exactly

what the Petitioner Doe had been requesting all these years but falling on the indifferent deaf ears of the Respondents.

The trial Judge even though he dismissed the Plaintiff's cause of action for an injunction to be freed from administrative solitary isolation gratuitously commented without any legal force:

> "Mr. (Doe), I want you to know that the court, even though it has made the ruling that it considers the law mandates, it is not unsympathetic to your conditions. You're in the unfortunate situation of being someone who, because of your cooperation against other, has been placed in a confining situation that you do not desire... But I will say on the record that unless somebody just sticks their head in the sand in this case that there's got to be a better way to deal with you than the dilemma that exists at this time...You're paying the price for your crimes by being incarcerated, but it does appear that you're paying an additional price for your cooperation. I have not heard any evidence in this case that suggests that you should be in some sort of special protective custody, or that you should be in some sort of administrative segregation because you are a violent defendant, or prisoner: or because you're a threat to other prisoners. All the evidence before the court suggests that your reason for being in this status is because of your prior cooperation. And again I emphasize that somebody in the prison system should address this and find a better way of dealing with you than forcing you in a protective custody situation when there may be a better answer." (Tr. 91 - 92).

Although sympathetic the United States District Court for the Southern District of Georgia did not do

anything about the Petitioner's plight remaining in perpetual solitary confinement even after the Court of Appeals had held that he has a constitutional entitlement to relief which has been ignored by the trial court. It does no good to make the gratuitous findings quoted above unless the court is willing to back it up with an order. And it has done no good to bring the Petitioner's plight to the attention of the officials of the Georgia Department of Corrections because that had been done for seventeen years by the Petitioner protesting his continued indefinite solitary confinement and requesting that he be transferred to a prison where he could be safe in the general population.

This exhibiting of deliberate indifference is perhaps the most egregious solitary confinement violation of the Eighth Amendment in modern history. It is not his fault. It is clearly the fault the of the Respondents' disclosure of his real name and the continued intransient indifference of the Respondents as officials of the Georgia Department of Corrections to repeated requests to transfer him to a prison where his identity could be kept secret and his safety reasonably assured in the general prison population. The Georgia Assistant Attorney General arguing against giving John Doe relief from solitary confinement contend that he is in solitary confinement because of his own choices in testifying for the United States against the Mexican Mafia, entering the Federal Witness Protection Program, and then violating the child molestation laws of the State of Georgia. This argument ignores that the reason he initially requested administrative segregation seventeen years ago was that his real name had been disclosed by the Defendants and the Defendants had transferred him to a prison housing the most violent prisoners, including members of the Nuestra Familia who threatened and made attempts on his life. The Respondents' arguments also ignored John Doe's numerous requests for transfer to a safer prison environment where his real name would not be known and he could be safe in the general population.

III. QUALIFIED IMMUNITY DOES NOT PROTECT PRISON OFFICIALS FROM THE OBVIOUS CONSTITUTIONAL VIOLATIONS WHO UNDER COLOR OF LAW OF HAVE DE FACTO KEPT THE PETITIONER INCARCERATED IN SOLITARY CONFINEMENT FOR SEVENTEEN YEARS WITHOUT TRANSFERING HIM TO A PRISON WHERE HIS LIFE WOULD NOT HAVE BEEN IN IMMINENT DANGER

Qualified immunity does not protect prison officials against liability for continuing the incarceration of an inmate in solitary confinement for seventeen years to protect him against death from other inmates in the general prison population when they have been deliberately indifferent to transferring the inmate to another prison where he would have been safe in the general prison population. The recent United States Supreme Court case of *Hope v. Pelzer,* 536 U.S. 730 (2002) establishes that the Respondents can be liable for damages under 42 U.S.C. § 1983 when under color of law they "violate clearly established statutory or constitutional rights of which a reasonable person would have known", and that "for a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,...but it is to say that in light of pre-existing law the unlawfulness must be apparent."

Deliberate indifference to Plaintiff's plight of being held in administrative solitary confinement for the incredible period of seventeen years is abundantly clear that the Georgia official were violating the Petitioner's constitutional rights in violation of the Eight and Fourteenth Amendments. The opinion in *Hope v. Pelzer* pointed out that the standard

only required that prior law give officials a general "fair warning" that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was "clearly established" in civil litigation under § 1983." 536 U.S. 730, 740. Not only did the Defendants in Doe's case have fair warning that the continued deliberate indifference of continuing solitary confinement was very injurious to the Petitioner as well as grossly in violation of the United States Constitution, but they were directly advised by the Court of Appeals' previous opinion that continued long term administrative solitary confinement would violate the United States Constitution. The Respondents continued to incarceration him in solitary confinement and refused to transfer him to a prison where he would not be known and would be safe. The trial Court's gratuitous comments were of no force or effect and as for the last seventeen year fell on deal ears of officials of the Georgia Department of Corrections who would do nothing to relieve Doe's plight.

The Court of Appeals Decision found that the Petitioner "has suffered no legally cognizable injury as a result." (Appendix, A-2). This is a finding without any basis since there has been no hearing or evidence on the effects of the Petitioner's exceptionally long term incarceration in solitary confinement. If the Opinion was referring to the provisions in the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, its provisions cannot be applied retroactively to deny the Plaintiff any relief when there was no showing of actual physical injury to the Plaintiff. The United States Supreme Court in *Martin v. Hadix*, 527 U.S. 343 (1999), unequivocally held that the PLRA did not apply retroactively to cases which arose before the effective date of the PLRA. Justice O'Connor writing for the majority concluded, "Because we find the PLRA, if applied to post judgment monitoring services performed before the effective date of the Act, would have a retroactive effect inconsistent

with our assumption that statutes are prospective, in absence of an express command by Congress to apply the Act retroactively, we decline to do so." Following this precedent the Ninth Circuit in *Chappell v. Dickerson,* 238, F. 3d 427, 2000 U.S. App. Lexis 24816 (9th Cir. 2000) summarily permitted the same issue as in the instant case to go forward in an action involving psychological injury alone arising out of "deliberate indifference" actions of correctional officials prior to the effective date of the PLRA. The Eleventh Circuit in *Mitchel v. Farcass*, 112 F. 3d 1483 (11th Cir. 1997), distinguished the permitted current application of the PLRA to the procedural requirement of paying filing fee verses the prohibited substantive effect of impairing rights a party possessed before the enactment. *Thomas v. Hill,* 963 F. Supp. 753 (N.D. Ind. 1997) is a very similar case to the instant case in which the District Court held that the PLRA did not apply retroactively to an already filed case where the prison officials exposed the inmate to harm in retaliation for his testifying against another prison official who was dealing in illegal drugs and the inmate was not barred from pursuing an action for mental and emotional injury without prior showing of physical injury. Neither should the Petitioner be barred from establishing his legally cognizable injury as a result of his seventeen years in solitary confinement because of the deliberate indifference of the Respondents who knew or certainly should have known that their actions violated the constitutional and civil rights of the Petitioner in de facto incarcerating Petitioner in perpetual solitary confinement at the Georgia State Prison where his life would have been in imminent danger in the general prison population and not transferring him to a prison where he could have been in the general prison population with relative safety.

IV. THE INDEFINITE LONG TERM SOLITARY CONFINEMENT OF THE PETITIONER VIOLATES THE *UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* WHICH WAS RATIFIED BY THE UNITED STATES

The United States became a party on November 20, 1994 to the *United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Treaty Document 100-20. The Convention's definition of "torture" was enacted into law by 1994 P.L. 103-236, 18 U.S.C. § 2340. The definition of "torture" in §2340 provides:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from... (C) the threat of imminent death; or (D)... other procedures calculated to disrupt profoundly the senses or personality;

It is submitted that the keeping the Petitioner at the Georgia State Prison where known members of the Nuestra Familia would subject the Petitioner to "threat of imminent death" which de facto required his indefinite incarceration in solitary confinement for seventeen years was sadistically calculated to "disrupt profoundly the senses or the personality." This United Nations Treaty is now the law of the United States and conduct of the Respondents fits the definition of torture which was inflicted upon the Petitioner by virtue that they knew that he would have been subjected to "threat of imminent death" at the Georgia State Prison

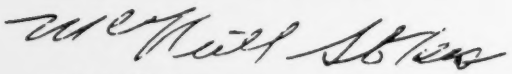
disclosing his real name among inmates of the Nuesta Familia or being subjected to perpetual solitary confinement which will "disrupt profoundly [his] senses or [his] personality."

Mr. Justice Beyer in his dissenting opinion from the denial of certiorari in *Knight v. Florida*, 528 U. S. 990 (1999) pointed to the United States ratification of the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* and commented that other foreign county standards as useful in deciding the case under Constitution of the United States. However, in Doe's case the enabling definition of torture is now an important part of our law. The keeping of the Petitoner in perpetual solitary confinement under threat of imminent death in the general prison population fits the language and spirit of the *Convention Against Torture* against mind altering conditions likely to be disrupting of senses and personality.

CONCLUSION

Petitioner has endured an unprecedented seventeen years long period of solitary confinement which is reminiscent of the endurance of Alexander Dumas' depiction of the isolation of *The Man in the Iron Mask*. It is also as barbaric as Alabama's hitching prisoners to a post all day in the hot sun without food, water or bathroom breaks that shocked the consciences of the United States Supreme Court in *Hope v. Pelzer*, supra. But by comparison The Alabama prison authorities only hitched prisoners to a post for a day, John Doe had been hitched to his solitary confinement cell for seventeen years. Surely our civilized society cannot tolerate this clear injustice as this Court has previously defined to give Doe judicial relief under the Eighth and Fourteenth Amendments.

Respectfully Submitted,



McNeill Stokes
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No. _____

In The Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DAVID THOMPSON, ALLEN AULT, A.G. THOMAS, MICHAEL GROVES, and HUGH LONG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
March 9, 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-11576

D.C. Docket No. 95-00147-CV-6

REY DAVID VARGAS,

Plaintiff-Appellant,

versus

DAVID THOMPSON,
ALLEN AULT,
A.G. THOMAS,
MICHAEL GROVES,
HUGH LONG,

Defendants-Appellees,

JOHNNY SIKES,
Southeastern Regional Director of the
Georgia Department of Corrections,
KATHLEEN HAWK SAWYER, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Georgia

(March 9, 2004)

Before ANDERSON, BARKETT and RONEY, Circuit Judges.
PER CURIAM:

Based upon the representations of counsel at oral argument on November 4, 2003, the Court, by interim Order dated November 12, 2003, referred this appeal to the Kinnard Mediation Center for settlement discussions under Federal Rule of Appellate Procedure 33 and Eleventh Circuit Rule 33-1. As a result of these efforts at mediation, the parties have resolved the issue of the transfer of the Appellant. However, despite extensive efforts, the parties were unable to settle their differences on the two remaining issues, namely, (1) whether the district court should have allowed the Appellant to pursue an action under the Eighth and Fourteenth Amendments because of his seventeen years in administrative solitary confinement, and (2) whether the court erred in granting a judgment as a matter of law in favor of the Appellees.

After careful review of the parties' briefs and the record, we agree that the Appellant has been in protective custody at his own request and has suffered no legally cognizable injury as a result. We thus find no reversible error and affirm the judgment of the district court with respect to both issues.

AFFIRMED.

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.

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CLERK /s/
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JOHN DOE,

Plaintiff

vs.) Case No.: CV695-147

DAVID THOMPSON;
ALLEN AULT;
A.G. THOMAS;
MICHAEL GROVES;
and HUGH LONG,

Defendants.

ORDER

Before the Court is Plaintiff's Motion to Modify Court's Order of March 4, 2003. (Doc. 281). Plaintiff asks the Court to modify its Order to allow Plaintiff to raise at trial the issue of unconstitutional conditions of confinement in administrative segregation. This claim was dismissed at the summary judgment stage in an order dated March 28, 2000. Summary judgment was granted on the ground that there existed no genuine issues of material fact as to whether Defendants Thompson and Thomas exhibited

deliberate indifference to a risk to Plaintiff's health or safety from his conditions of confinement. Accordingly, Plaintiff's motion is **DENIED.**

SO ORDERED this 14th day of March, 20, 2003.

s/William T. Moore, Jr.
WILLIAM T. MOORE, JR
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

THOMAS K. KAHN
CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9235

D.C. Docket No. 98-00049-CV-6

JOHN DOE,

Plaintiff-Appellant,

versus

JOHNNY SIKES, Warden,
THURBERT BAKER,

Defendants-Appellees,

Appeal from the United States District Court for the
Southern District of Georgia

(June 7, 2000)

Before BIRCH and BARKETT, Circuit Judges
and ALARCON*, Senior Circuit Judge.

---

*Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

Appellant appeals the district court's denial of his motion for a preliminary injunction. Upon review of the record, we find that the district court abused its discretion in denying Appellant's motion for preliminary injunction at that early stage of the proceedings.

I. BACKGROUND

John Doe[1] a Georgia prisoner, filed a petition for writ of habeas corpus which the district court construed as an action under 42 U.S.C. § 1983. In the petition, he alleged, inter alia, that the defendants, Georgia State Prison ("GSP") Warden Johnny Sikes, Commissioner J. Wayne Garner, Valdosta Correctional Institute ("VCI") Warden LeLand Linaham and Deputy Warden Mike Keown, and Attorney General Thurbert Baker had violated his constitutional rights by transferring him between VCI, GSP, and Autry State Prison ("ASP"). Doe also filed a motion for preliminary injunction, and included an affidavit in which he attested that, upon entering VCI, he had requested protective custody from Linaham because the Nuestra Familia, Mexican Mafia, and Aryan Brotherhood had placed "contracts on [his] life." R1-6, Affidavit at 1-2. He stated that, although he advised Linaham that he was participating in the Federal Witness Protection Program because he had testified against the named groups in eight murder trials, Linaham placed him in the general population and refused to listen to him. He also claimed that he spoke about the matter to Keown, but he also refused to grant him protective custody. After he was threatened by two inmates for being a "snitch," he wrote a letter to the F.B.I. and filed a civil complaint. Id.

[1] We have used a fictitious name in order to protect the identity of this inmate, given the allegations of his pleadings as described below. We also direct the Clerk of this Court to place under seal the entire record and pleadings in this case.

at 3. He said that, three days after filing the complaint, he asked Keown for a grievance form in order to complain about the lack of treatment for an abscessed tooth and Keown ordered him out of his office. See id. at 3-4. Doe claimed that Keown then placed him in administrative segregation and filed a fabricated disciplinary report. See id. Doe subsequently filed several grievances against Linaham and Keown, complaining that they had denied him protective custody and necessary dental work and were disciplining him in retaliation for the filed grievances. See id. at 4. An F.B.I. agent contacted Linaham and was advised by him that Doe would be transferred because his life was in danger. Within one week, Doe was transferred to GSP. See id. at 6.

Doe filed a supplemental motion for preliminary injunction and attached another affidavit in which he stated that, in 1998, he was transferred to ASP two days after Sikes informed him that he was to be transferred because he had brought too many lawsuits against Georgia prison officials. See R1-9, Affidavit at 1. Doe claimed that, once he was at ASP, an ASP guard also told him that he had been transferred because he filed too many lawsuits. See id. at 3. Doe says that he has been housed in solitary confinement continuously since 1996, at both GSP and ASP. See R1-9, Brief at 5. Doe claimed that, during the trial leading to his incarceration, the Gwinnett County District Attorney revealed confidential information to the media about his participation in the Federal Witness Protection Program which put him at substantial risk of attack in prison as a "snitch." Id. at 4-5. He sought an injunction directing state prison officials to release him from solitary confinement, to transfer him into federal custody or to an out-of-state prison where he would not be known, and to enjoin any future retaliatory transfers.

The magistrate judge recommended that Doe's Eighth Amendment claim for deliberate indifference to his safety be dismissed and that the motion be denied. See R1-13

at 6. He found that Doe had failed to establish a substantial risk of irreparable injury or likelihood of success on the merits of this claim. The magistrate judge noted that Doe had not alleged that the state officials had been unable to protect him, and had not alleged facts that "definitively show" that his transfers were in retaliation for exercising his First Amendment right to petition the government. Id. at 5-6. However, two days later, the magistrate judge found that Doe's complaint stated a viable First Amendment claim and ordered service of process on Linaham and Keown. See R1-15 at 3.

Doe filed objections to the magistrate judge's recommendation that his motion for preliminary injunction be denied. He maintained that he had written letters to Sikes, Garner, and Bowers which were either ignored or unanswered, showing a deliberate indifference to his health and safety, and that his being in administrative confinement for more than 12 years was cruel and unusual punishment because it was essentially punitive. See R1-17 at 8, 10. He explained that he had alleged facts showing that his transfers were retaliatory, and contended that his transfer to a federal prison would allow him to enter a facility especially for government informants or that his transfer to a prison in a different jurisdiction would protect him from inmates since the media would not have to broadcast his identity. See id. at 23-24. In support of his objections, he attached affidavits from two prisoners who stated that they had each heard several inmates yell death threats to Doe. See id., Exhs. B and D. One of the prisoners also said that he had overheard Keown saying that he wanted Doe and other "writ writers" transferred to GSP shortly before Doe was transferred. Id., Exh. D.

The district court overruled Doe's objections and adopted the magistrate judge's recommendation, denying Doe's motion for preliminary injunction and dismissing his Eighth Amendment claim of deliberate indifference. Doe

appealed. This court found it had jurisdiction to review the denial of the motion for preliminary injunction, but lacked jurisdiction to review the dismissal of his Eighth Amendment claim because the order did not dispose of all of the issues in the case.

II. DISCUSSION

Doe argues that the district court abused its discretion by denying him a preliminary injunction on the grounds that he failed to show a substantial threat of irreparable injury or a likelihood of success on the merits of his Eighth and First Amendment claims. He maintains that, as long as he is housed at GSP, he will continue to suffer severe psychological stress because he lives in close proximity to prisoners who know that he is a government informant and who threaten to kill him.

A. The Eighth Amendment Claim

We review the district court's denial of a preliminary injunction under an abuse of discretion standard. See Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1517 (11th Cir. 1994), cert. denied, 513 U.S. 1146, 115 S.Ct. 1092 (1995). Although review is limited, a court "'may look to otherwise nonappealable aspects of the order,'" Speer v. Miller, 15 F.3d 1007, 1009-10 (11th Cir. 1994) (quoting Callaway v. Block, 763 F.2d 1283, 1287-88 n. 6 (11th Cir. 1985)), where the issue is "so 'closely related to the interlocutory order being appealed,'" id. (quoting Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466, 1472 (11th Cir. 1985).

To obtain a preliminary injunction, a plaintiff must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the plaintiff's threatened harm outweighs the threatened harm to the defendant; and (4) an injunction would not disserve the

public interest. See Speer, 15 F.3d at 1010 n. 4, (citing Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991), cert. denied, 502 U.S. 1122, 112 S.Ct. 1245 (1992)). A preliminary injunction transferring an inmate to a different institution may be properly granted upon a finding that the inmate's life and safety are in danger in the institution where he is incarcerated and that, because of the particular and unusual facts of his situation, the safety of the prisoner cannot be adequately guaranteed at the institution. See Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980).

A prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment if the official knows that the inmate faces a substantial risk of harm and disregards that risk by failing to take reasonable efforts to abate it. See Farmer v. Brennan, 511 U.S. 825, 828, 114 S.Ct. 1970, 1974 (1994). A claim alleging "that prison officials have labeled (a prisoner) a snitch and are exposing him to inmate retaliation, perhaps because of his conduct in bringing prior lawsuits . . . is sufficient to carry a cause of action through the service of process stage." Harmon v. Berry, 728 F.2d 1407, 1409 (11th Cir. 1984). "[A] prison inmate has a constitutional right to be protected from the constant threat of violence and from physical assault by other inmates. " Zatler v. Wainwright, 802 F.2d 397, 400 (11th Cir. 1986). In reviewing the dismissal of claims, this court accepts as true all well-pleaded facts in the complaint and all reasonable inferences drawn from those facts. See Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), cert. denied sub nom. Deutcsh v. Oladeinde, 507 U.S. 987, 113 S.Ct. 1586 (1993).

Doe claimed that he was an informant who had testified for the prosecution in eight murder trials, was housed in segregated confinement with violent felons, and had been threatened by at least two prisoners on two separate occasions with death or serious physical injury. He

maintained that he had informed prison officials numerous times of his status as a government informant and of his need for protective custody, but that they ignored his requests and placed him into solitary confinement as punishment. Taking everything he says as true, Doe established an Eighth Amendment violation under Farmer. The magistrate judge, therefore, erred in finding that Doe had failed to allege that the jail officials had deliberately fostered dangerous conditions and refused his safety concerns, and had failed to allege that he had suffered any harm at the hands of the other inmates. Further, the district court could have found that, based on the particular and unusual facts that Doe was a government informant and had received threats to his life, he had satisfied the second prong of the test for a preliminary injunction that there was a substantial risk of irreparable harm.

B. First Amendment Claim

In order "[t]o state a first amendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right [so long as] the gist of the retaliation claim is that a prisoner is penalized for exercising the right of free speech." Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997) (quoting Thomas v. Evans, 880 F.2d 1235, 1242 (11th Cir. 1989). In Mitchell, this court reversed the dismissal for failure to state a claim where the prisoner alleged that he had been transferred to another facility after a writing a letter and filing a grievance concerning prison activities. Id. at 1489-90. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347 373, 96 S.Ct. 2673, 2690 (1976).

Doe claimed that, in retaliation for his filing grievances and lawsuits against prison officials, he was transferred between VCI, GSP, and ASP. He argues that, in retaliation for writing to the F.B.I. and filing a complaint

regarding his placement in the general prison population, Keown refused him dental treatment for an abscessed tooth, placed him in administrative segregation, and filed a fabricated disciplinary report against him.

In the absence of evidence to the contrary, Doe presented sufficient allegations to show that he has been transferred and placed in administrative segregation for exercising his First Amendment right. Further, the magistrate found that Doe established a likelihood of success on this claim. The threatened harm to Doe outweighs any harm to the defendants if an injunction is granted, and the granting of a preliminary injunction would not disserve the public interest.

III. CONCLUSION

Doe established that he met the four criteria for issuance of a preliminary injunction. The district abused its discretion in denying Doe's motion at this early stage of the proceedings. We vacate and remand for an evidentiary hearing.

VACATED AND REMANDED.

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.

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CLERK /s/
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

REY DAVID VARGAS,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION
	:	NO.: CV695-147
DAVID THOMPSON;	:	
ALLEN AULT;	:	
A.G. THOMAS;	:	
MICHAEL GROVES,	:	
and HUGH LONG,	:	
	:	
Defendants.	:	

ORDER

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court.

Plaintiff's Motion for Summary Judgment is **DENIED**. Defendants' Motion for Summary Judgment is

GRANTED in part and **DENIED** in part. Summary judgment is **DENIED** to Defendants on the following claims: (1) Plaintiff's claim that Defendants Ault and Long exhibited deliberate indifference to his health or safety by transferring him to Valdosta Correctional Institution; (2) Plaintiff's claim that Defendants Thompson and Thomas exhibited deliberate indifference to a risk to Plaintiff's health or safety through excessive exposure to Environmental Tobacco Smoke; (3) Plaintiff's claim that Defendant Groves exhibited deliberate indifference to his health or safety by ignoring his request for a transfer from Valdosta Correctional Institution; and (4) Defendants' claim of summary judgment on the basis of qualified immunity. Summary judgment is **GRANTED** on Plaintiff's claims of deliberate indifference and deprivation of equal protection regarding the conditions Plaintiff's confinement.

SO ORDERED this 28th day of March, 2000.

s/William T. Moore, Jr.
WILLIAM T. MOORE, JR
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

FILED
U.S. DIST. COURT
BRUNSWICK DIV.

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CLERK s/
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

REY DAVID VARGAS,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION
	:	NO.: CV695-147
DAVID THOMPSON;	:	
ALLEN AULT;	:	
A.G. THOMAS;	:	
MICHAEL GROVES,	:	
and HUGH LONG,	:	
	:	
Defendants.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, an inmate presently confined at Georgia State Prison ("GSP") in Reidsville, Georgia, has been permitted to proceed *in forma pauperis* in an action under 42 U.S.C. § 1983 contesting the conditions of his confinement. Plaintiff has filed a Motion for Summary Judgment. Defendants have filed a response in opposition to Plaintiff's motion and a cross-motion for summary

judgment. Plaintiff has filed a response to Defendants' motion.

STATEMENT OF THE CASE

In his Complaint and numerous amendments, Plaintiff alleges several claims against Defendants Thompson, Thomas, Ault, Long, and Groves. First, Plaintiff alleges that on August 5, 1994, Defendants Ault and Long exhibited deliberate indifference to his safety in violation of the Eighth Amendment by ordering that he be transferred from protective custody ("PC") confinement at GSP to Valdosta Correctional Institute ("VCI"), where he was placed in the general population. Plaintiff asserts that Defendants Ault and Long knew that his life was in danger of attacks from other inmates because he was a key government witness in eight murder trials in California against high-level prison and street gang members of a Mexican mafia family, yet they transferred him to VCI despite knowledge of the danger to Plaintiff. Plaintiff contends that his life was threatened by two inmates housed in the general population at VCI because he was an informant for the federal government. Defendants Ault and Long assert that they had no personal knowledge of Plaintiff's need for protective custody and were not deliberately indifferent to his safety.

Second, Plaintiff alleges that Defendants Thompson and Thomas exhibited deliberate indifference to his health and safety by exposing him to excessive levels of environmental tobacco smoke ("ETS") while he was confined in protective custody at GSP from 1988-1995.[2] According to Plaintiff, he complained of the unbearable levels of smoke to both Defendants and they did nothing. Plaintiff contends that he has suffered eye irritation,

[2] Although Plaintiff was transferred to VCI on August 9, 1994, he was transferred back to protective custody at GSP on April 5, 1995.

headaches, nausea, dizziness, and hacking coughs as a result of the alleged exposure to ETS. Defendants deny that they were deliberately indifferent in exposing Plaintiff to ETS. They assert that there is a good ventilation system for airflow exhaust, which was checked regularly by an environmental specialist. Defendants also contend that Plaintiff's medical records do not indicate that he suffered or complained about any physical symptoms related to ETS.

Finally, Plaintiff asserts that the conditions of his confinement in the Special Management Unit under protective custody violated the Eight Amendment's prohibition of cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection of the laws.[3] In support of his claim of Defendants Thompson and Thomas's deliberate indifference to the conditions of his confinement, Plaintiff alleges that he has been confined to protective custody for approximately thirteen years, under which he remains locked-down in his cell twenty-four hours a day, with the exception of one hour per day for outside recreation and fifteen minutes a day for a shower. Additionally, Plaintiff contends that the restrictions placed on inmates housed under protective custody are excessive because they allegedly are denied access to vocational and educational programs, the gym, counseling, and meaningful library access. Plaintiff also alleges that these restrictions on the privileges that general population inmates enjoy violates his equal protection rights. Defendants deny that have exhibited deliberate indifference to Plaintiff's conditions of confinement. They also contend that such restrictions are necessary to ensure the safety of inmates that are

[3] Plaintiff alleges additional causes of action for the first time in his Motion for Summary Judgment, including denial of his substantive due process rights, fabrication of a disciplinary report, denial of procedural due process, and a retaliation claim. However, as Plaintiff has been given many opportunities to amend his Complaint and failed to add these claims at the appropriate time, the Court will not address these improperly joined claims.

housed under protective custody, and that protective custody inmates still enjoy many of the same privileges as general population inmates.

STANDARD OF DETERMINATION

Summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of showing that there is no genuine dispute as to any material fact in the case, and that the party is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Clemons v. Dougherty County, 684 F.2d 1365, 1368 (11th Cir. 1982). The party moving for summary judgment may meet this burden by showing that the nonmovant has failed to make a showing sufficient to establish the existence of an element essential to the nonmovant's case and on which the nonmovant will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If there is any factual issue in the record that is unresolved by the motion for summary judgment, the court may not decide that matter. See Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).[4] All reasonable doubts must be resolved in favor of the party opposing summary judgment. Rooney v. Watson, 101 F.3d 1378, 1380 (11th Cir. 1996); Casey Enters. v. American Hardware Mut. Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981).

However, when the moving party's motion for summary judgment has pierced the pleadings of the opposing party, the burden shifts to the opposing party to show that a genuine issue of material fact exists. Anderson v.

[4] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1985); Real Estate Fin. v. Resolution Trust Corp., 950 F.2d 1540 1543 (11th Cir 1992). An issue of material fact is "genuine" if the nonmoving party responds with evidence "such that a reasonable jury could return a verdict" in its favor. Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510. However, a court must first determine if the movant satisfied his initial responsibility of demonstrating the absence of a genuine issue of material fact and, further, whether he is entitled to summary judgment as a matter of law before the burden shifts to the nonmoving party. Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1022 (11th Cir. 1988).

DISCUSSION AND CITATION OF AUTHOIRTY

I. Summary Judgment Should be Denied to Plaintiff and Defendants on the Claim That Defendants Ault and Long Were Deliberately Indifferent to Plaintiff's Safety by Transferring Him to VCI.

Plaintiff alleges that Defendants Ault and Long exhibited deliberate indifference to his safety when they transferred him from protective custody at GSP to VCI on August 5, 1994, where he was placed in the general population. (Pl. Aff. Supp. Summ. J. ¶ 5.) Plaintiff asserts that Defendants transferred him despite their knowledge that his life was in danger in general population, due to the prosecutors in Plaintiff's criminal case revealing to the media his participation as a key witness for the government in several murder trials and in the Witness Protection Program. In support of his claim, Plaintiff offers several items of evidence. First, Plaintiff provides a November 21, 1986 letter by a F.B.I. agent to the Georgia Department of Corrections ("GDC"), in which the F.B.I. agent set forth Plaintiff's extensive assistance to the federal government and his placement in the Witness Protection Program. (Letter Attached Compl.) The letter also informed GDC that Plaintiff would "not be taken into Federal custody

as long as the State of Georgia can keep him safe either in its own system or through transfer to another state." (Id.) Defendants admit that this letter was in Plaintiff's prison file. (Def. Ault Admis. No. 8; Def. Long Admis. No. 11.) Plaintiff also provides an admission from Defendant Long that he and Defendant Ault participated in the decision to transfer Plaintiff to VCI, (Def. Long Admis. No. 5, No. 8.), as well as the transfer order that Defendant Long signed. Defendant Long also admits that some of the inmates housed in the general population at VCI may have committed violent crimes. (Def. Long Admis. No. 15.) Plaintiff asserts that his life was threatened by two inmates, armed with knives, who were housed in the general population at VCI because he was an informant for the federal government. (Pl. Aff. Supp. Summ. J. ¶ 7.)

Defendants Ault and Long deny that they exhibited deliberate indifference to Plaintiff's safety. Defendant Long asserts that Plaintiff was transferred because of inmate population redistribution. (Def. Long Answers Pl. Interrogs. No. 6.) Defendant Ault denies that Plaintiff's life was in danger prior to his transfer from GSP to VCI or that his life was in danger because of his participation in the Witness Protection Program. (Def. Ault Admis. No. 3, No. 9.) Defendant Ault and Defendant Long deny that they had knowledge of Plaintiff's need for protective custody and contend that they did not make any decisions regarding his housing status. (Def. Ault Aff. ¶ 5; Def. Long Aff. ¶ 5.)

It is well established that the Eight Amendment imposes a duty upon prison officials to provide for the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994) (citation omitted). Specifically, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Id. at 833, 114 S. Ct. at 1976 (quotation marks and citation omitted). However, an Eighth Amendment violation occurs only if two elements are

shown: (1) "the deprivation alleged must be, objectively, sufficiently serious," such that the conditions the inmate is confined under pose "a substantial risk of harm," and (2) the prison official must have exhibited "deliberate indifference to inmate health or safety." Id. at 834, 114 S. Ct. at 1977.

As the Eleventh Circuit noted, "deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999). On a motion for summary judgment, a genuine issue of material fact exists if the record contains evidence of a prison official's subjective awareness of the risk of harm to the plaintiff. Id. Therefore, a plaintiff must demonstrate that a defendant knew of the immediate safety risks and failed to take appropriate measures to prevent the harm.

Plaintiff and Defendants offer conflicting evidence of Defendants' subjective knowledge of harm to Plaintiff. As such, genuine issues of material fact exist as to whether Defendants Ault and Long were deliberately indifferent to Plaintiff's safety by transferring him to VCI on August 5, 1994.

II. Summary Judgment Should Be Denied to Plaintiff and Defendants on the Claim That Defendants Thompson and Thomas Exhibited Deliberate Indifference to Plaintiff's Health or Safety By Exposing Him to Excessive Levels of ETS.

Plaintiff alleges that Defendants Thompson and Thomas exhibited deliberate indifferent to his health or safety from October 1988-September 1995 when they exposed him to excessive levels of ETS from inmates and guards smoking in the dormitories at GSP. (Pl Aff. Supp. Summ. J. ¶ 12.) Plaintiff contends that as a result of this exposure, he suffers from eye irritation, headaches, nausea,

dizziness, and hacking coughs. (Id.) Plaintiff asserts that he notified Defendants Thompson and Thomas and medical personnel of the unbearable levels of ETS. (Id.; Pl Aff. Supp. Opp'n Def. Mot. Summ. J. ¶ 13.) Plaintiff alleges that Defendants had sufficient knowledge of the harm posed to him by this exposure and did not take any corrective measures. (Pl. Aff. Supp. Summ. J. ¶ 12.) In support of his claim, Plaintiff offers admissions from Defendants Thompson and Thomas that studies have indicated that ETS exposure can pose health risks. (Def. Thompson Admis. No. 7; Def. Thomas Admis. No 5.) Defendants also admit that the GDC implemented a no-smoking policy in the dormitories in 1996. (Def. Thompson Admis. No 8; Def. Thomas Admis. No. 6.) Plaintiff also offers the affidavit of Inmate John Scieszka, which states that Inmate Scieszka has personally observed Plaintiff hacking and coughing ever since he has known Plaintiff. (Scieszka Aff. ¶ 6.)

Defendants Thompson and Thomas deny exposing Plaintiff to excessive risks of ETS. They allege that GSP has an excellent ventilation system that adequately deals with airflow ventilation. (Def. Thompson Aff. ¶ 3; Def. Thomas Aff. ¶ 3.) Defendants assert that an environmental specialist regularly monitored the ventilation system. (Id.) Additionally, Defendants contend that Plaintiff's medical records indicate that he never suffered or complained about any symptoms related to ETS. (Scott Aff. ¶ ¶ 2-3; Def. Thomas Aff. ¶ 3.) Finally, Defendants Thomas asserts that Plaintiff's claims regarding ETS exposure should be barred because they were not filed within the two-year statute of limitations period.

As a threshold matter, the Court determines that plaintiff's claims against Defendant Thomas regarding ETS exposure are not barred by the statute of limitations. The statute of limitations in a 42 U.S.C. § 1983 action is determined by state law. Harding v. Staub, 490 U.S. 536, 538, 109 S. Ct. 1998, 2000, 104 L. Ed. 2d 582 (1989). In

Giles v. Garwood, 853 F.2d 876, 877 (11th Cir. 1988), the Eleventh Circuit held that the appropriate statute of limitations is that which provides a limitations period for personal injuries. The statute of limitations in Georgia for this action is two years. O.C.G.A. § 9-3-33. As Plaintiff alleged in his Complaint, filed on May 18, 1995, that the exposure to ETS was continuous from 1988 to 1995, his claims were filed within the two-year statute of limitations period.

The Supreme Court has held that a "cause of action exists under the Eighth Amendment when a prisoner alleges that officials have, with deliberate indifference, exposed him to levels of environmental tobacco smoke (ETS) that pose an unreasonable risk of serious damage to his future health." Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22 (1993). In order to establish an Eighth Amendment violation for exposure to ETS, a prisoner must establish both an objective and subjective component. Id. With respect to the objective factor, a scientific and statistical inquiry must be made with regard to "the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS." Id; see also Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811 (1994) (defining deliberate indifference). Therefore, a plaintiff must demonstrate that the defendant knew of the immediate safety risks and failed to take appropriate measures to prevent the harm.

Plaintiff offers evidence that he suffers ailments related to his alleged exposure to excessive levels of ETS. Defendants offer conflicting evidence regarding Plaintiff's alleged exposure and resulting ailments. As such, genuine issues of material fact exist as to whether Defendants Thompson and Thomas were deliberately indifferent in exposing Plaintiff to excessive level of ETS.

III. **Summary Judgment Should be Granted to Defendants Thompson and Thomas on Plaintiff's Claims Alleging That the Conditions of His Confinement Constituted Cruel and Unusual Punishment and Denied Him Equal Protection of the Laws.**

In his Complaint, Plaintiff asserts that Defendants Thompson and Thomas were responsible for confining him under unconstitutional conditions. Specifically, Plaintiff alleges that the conditions of the Special Management Unit, where he was housed under protective custody status, constituted a risk to his health and safety and that Defendants Thompson and Thomas were deliberately indifferent to that risk. Plaintiff also contends that he as confined under conditions different than inmates in general population who are similarly situated to Plaintiff. In support of these claims, Plaintiff offers evidence that inmates under protective custody status are locked-down in their cells twenty-four hours a day, with only one hour outside of the cell for outdoor recreation and a fifteen minute shower daily. (Pl. Aff. Supp. Summ. J. ¶ 1; Carroll Aff. ¶ 1(a).) Plaintiff also complains that inmates under protective custody are denied many privileges that are afforded to inmates in general population, including vocational and educational classes, gym access, and unlimited access to legal materials and the law library. (Pl. Aff. Supp. Summ. J. ¶ 1; see also Carroll Aff. ¶ 1(b)-(i).) Plaintiff also alleges that the differences in the conditions of confinement between protective custody status inmates and general population inmates violates his equal protection rights.

Defendants Thompson and Thomas deny being deliberately indifferent to Plaintiff's health or safety or depriving him of equal protection of the laws. Defendants allege that the restrictions placed on protective custody inmates are necessary to protect the inmates' safety. (Def. Thomas Aff. ¶ 4; Defs.' Brief Supp. Summ. J. ¶ 2.) In their

Response to Plaintiff's Request for Admissions, Defendants Thompson and Thomas refute Plaintiff's allegations about the denial of privileges provided to general population inmates and show that protective custody inmates were given similar privileges, which were restricted, as those provided to general population inmates. (Def. Thompson Admis. No. 17-21; Def. Thomas Admis. No. 14.)

A. Deliberate Indifference to a Risk to Plaintiff's Health or Safety from the Conditions of His Confinement.

It is well established that the Eight Amendment imposes a duty upon prison officials to provide for the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994) (citation omitted). Specifically, prison officials are vested with the duty to safeguard inmates against unsafe conditions of confinement. This duty to safeguard requires prison officials to provide inmates with adequate food, shelter, clothing, and medical care. Id. at 832, 114 S. Ct. at 1976. In order to establish deliberate indifference to conditions of confinement, a plaintiff must show two elements. Id. at 834, 114 S. Ct. at 1977; Cottrell v. Caldwell, 85 F.3d 1480, 1490-91 (1996). The first element is objective, where a plaintiff must establish that the deprivation alleged was "objectively, sufficiently serious." Farmer, 511 U.S. at 834, 114 S. Ct. at 1977; Cottrell, 85 F.3d at 1491. The second element is subjective, where a plaintiff must establish that a prison official exhibited "'deliberate indifference' to inmate health or safety." Farmer, 511 U.S at 834, 114 S. Ct. at 1977; Cottrell, 85 F.3d at 1491. "Deliberate indifference" requires a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834, 114 S. Ct. at 1977.

In the case *sub judice*, Plaintiff has failed to produce evidence to support his claim that his conditions of confinement constituted cruel and unusual punishment.

Assuming, without deciding, that the conditions of Plaintiff's confinement were objectively, sufficiently serious, Plaintiff has failed to offer any evidence that Defendants Thompson and Thomas were deliberately indifferent to a risk t his health or safety from the conditions of his confinement. Defendants assert that the restrictions placed on protective custody inmates are required for the protection of the inmates' under such status. The record is devoid of any evidence showing that Defendants had the sufficiently culpable state of mind required for a deliberate indifference claim. There is no genuine issue of material fact as to whether Defendants Thompson and Thomas exhibited deliberate indifference to a risk to Plaintiff's health or safety from his conditions of confinement. Therefore, summary judgment should be **GRANTED** to Defendants Thompson and Thomas on this claim.

B. Denial of Equal Protection Relating to the Differences in Conditions of Confinement Between Protective Custody Inmates and General Population Inmates.

The Supreme Court has long established that the Equal Protection Clause requires that "all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985). In order to prevail on an equal protection claim not based upon membership in a protected class, a plaintiff must meet two requirements: (1) "that he was treated differently than other prisoners in his circumstances," and (2) that such unequal treatment was due to intentional or purposeful discrimination. Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644, 650-51 (D.C. Cir. 1987).

In the case *sub judice*, Plaintiff has failed to produce evidence sufficient to support a claim for deprivation of his equal protection rights. Plaintiff has failed to demonstrate

that he was treated differently than other prisoners under protective custody status, those inmates similarly situated to Plaintiff and in his circumstances. Plaintiff has only alleged that his conditions of confinement are different than those of general population inmates, who are not subjected to the same restrictions as protective custody inmates, and thus are not similarly situated. There is no genuine issue of material fact as to whether Defendants Thompson and Thomas deprived Plaintiff of his rights to equal protections of the laws in relation to the conditions of his confinement. Therefore, summary judgment should be **GRANTED** to Defendants Thompson and Thomas on this claim.

IV. Summary Judgment Should Be Denied on Plaintiff's Claim Alleging That Defendant Groves Exhibited Deliberate Indifference to Plaintiff by Failing to Protect Him from a Risk of Harm to His Safety.

Plaintiff alleges that Michael Groves, an Assistant Attorney General for the State of Georgia, exhibited deliberate indifference to his safety. (Pl. Am. Compl., Docket Doc. No. 5.) According to Plaintiff, Defendant Groves ignored his request to be transferred from VCI because his life was in danger, which Plaintiff allegedly made to Defendant Groves at a January 11, 1995 habeas corpus hearing. (Id.) On December 21, 1999, Defendants filed a Suggestion of Death as to Defendant Groves, (Docket Doc. 179,) but failed to respond in their Motion for Summary Judgment to the claim asserted against Defendant Groves by Plaintiff. As no substituted party has been named for Defendant Groves, he has not had an opportunity to respond. A genuine issue of material fact exists as to whether Defendant Groves was deliberately indifferent to Plaintiff's safety. Therefore, summary judgment should be **DENIED** to Plaintiff on this claim.

V. Defendants Are Not Entitled to Summary Judgment On the Basis of Qualified Immunity.

Defendants contend that they are entitled to summary judgment on the basis of qualified immunity. State employees retain qualified immunity when performing discretionary functions. This immunity shields those employees so long as their conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818. 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). However, it is clearly established that prison officials have a duty to protect inmates when they know of a substantial risk of harm to their health or safety. Farmer, 511 U.S. at 834, 114 S. Ct. at 1977, 128 L. Ed. 2d 811; see also McElligott, 182 F.3d at 1255. Genuine issues of material fact remain as to whether Defendants Ault, Long, Thompson, and Thomas were deliberately indifferent to a risk to Plaintiff's health or safety. Defendants cannot claim qualified immunity in this suit because there was a clearly established duty to protect Plaintiff from a known risk of substantial harm to his health or safety. Therefore, summary judgment should be **DENIED** to Defendants on the basis of qualified immunity.

CONCLUSION

For the above and foregoing reasons, it is my **RECOMMENDATION** that Plaintiff's Motion for Summary Judgment be **DENIED** and that Defendants' Motion for Summary Judgment be **GRANTED** in part and **DENIED** in part. Summary judgment should be **DENIED** to Defendants on the following claims: (1) Plaintiff's claim that Defendants Ault and Long exhibited deliberate indifference to his health or safety by transferring him to VCI; (2) Plaintiff's claim that Defendants Thompson and Thomas exhibited deliberate indifference to a risk to Plaintiff's health or safety through excessive exposure to ETS; (3) Plaintiff's claim that Defendant Groves exhibited deliberate indifference to his

health or safety by ignoring his request for a transfer from VCI; and (4) Defendants' claim of summary judgment on the basis of qualified immunity. Summary judgment should be **GRANTED** on Plaintiff's claims of deliberate indifference and deprivation of equal protection regarding the conditions Plaintiff's confinement.

SO REPORTED and **RECOMMENDED**, this 6th day of March, 2000.

s/James E. Graham
UNITED STATES MAGISTRATE JUDGE